

August 5, 2003

DOCKET NO.
03-00119

pre-hearing conference that ongoing negotiations have settled a number of issues since discovery was propounded. According to the parties, the following twenty-five issues remain unresolved: Issues 1, 2, 8(a), 9, 11(a), 11(b), 20(b), 21, 25, 26, 36, 37, 44, 45, 46, 47, 56, 57, 58, 59, 60, 62, 63, 64, 66 and 67. The parties have agreed to submit a revised joint matrix.

BellSouth's Objections to DeltaCom's Interrogatories and Request for Production of Documents

Upon discussion at the pre-hearing conference, it was determined that DeltaCom Interrogatory Nos. 16, 17, 18, 32, 37, 41, 42, 50, 51, 52, 53, 55, 58, 59, 60, 73, 74, 75, 76 and 77 pertain to issues that have been settled and thus were withdrawn by DeltaCom. Specific objections to the remaining interrogatories are discussed below:

DeltaCom Interrogatory No. 3

Interrogatory No. 3 states "Does BellSouth have agreements with its vendors that include terms longer than three years?" BellSouth objected to this request stating that the interrogatory was "overly broad, irrelevant and unduly burdensome."

During the pre-hearing conference, DeltaCom indicated that all it was requesting was a "yes or no" answer to this question and not for BellSouth to identify specific agreements. DeltaCom, however, proposed to narrow the interrogatory to apply only to BellSouth's interconnection agreements with CLECs certificated in Tennessee. BellSouth agreed to provide this information.

DeltaCom Interrogatory No. 4

Withdrawn by DeltaCom due to the agreement reached by the parties pertaining to DeltaCom Interrogatory No. 3.

DeltaCom Interrogatory Nos. 19 thru 27

DeltaCom Interrogatories 19 thru 27 relate to enhancements to BellSouth's Operational Support Systems (OSS) and potential deficiencies to such systems. BellSouth objects to these interrogatories on the basis that they pertain to issues that have been settled.

During the pre-hearing conference, DeltaCom argued that while some of the OSS issues have been settled, Interrogatory Nos. 19 thru 27 pertain to unresolved Issue No. 9 – “Should BellSouth be required to provide interfaces for OSS to DeltaCom which have functions equal to that provided by BellSouth to BellSouth's retail division?” and Issue 66 – “Should BellSouth provide testing of DeltaCom end-user data to the same extent BellSouth does such testing of it's own end-user data?”

BellSouth responded that Interrogatory Nos. 19 thru 27 pertain to past events and those events are irrelevant because the Authority has determined that BellSouth is providing CLEC's non-discriminatory access to its OSS.

The Pre-Arbitration Officer is sympathetic to BellSouth's arguments. Issues 9 and 66 appear to be broad and the remedies sought by DeltaCom are unclear. However, the information sought by DeltaCom is clearly relevant to Issues 9 and 66 and BellSouth's wholesale operations, and thus should be provided to DeltaCom so it is not hindered in arguing these issues before the arbitration panel. Such information could also prove beneficial to the arbitration panel in it's deliberations of Issues 9 and 66 as well as other outstanding issues such as Issue 65(b) – “Must BellSouth be required to provide notice 60 days in advance of deployment of OSS changes that would impact DeltaCom?” Therefore, BellSouth's objection is overruled and BellSouth is hereby ordered to provide the information requested in DeltaCom Interrogatory Nos. 19 thru 27.

DeltaCom Interrogatory No. 29

DeltaCom Interrogatory No. 29(a) states “Does BellSouth admit that 24 DeltaCom users were provided xDSL for many months without any apparent operational issues?” While 29(b) asks “Does BellSouth do business with xDSL providers other than its own?”

BellSouth states that the requests are vague and ambiguous. DeltaCom admits that there are words missing from the request and was unable to clarify what specifically it was requesting. In addition, this interrogatory appears to be a contention interrogatory similar to BellSouth Interrogatory Nos. 22 thru 71 which were objected to by DeltaCom and have also been disallowed. Therefore, BellSouth’s objection is granted.

DeltaCom Interrogatory Nos. 34, 35 and 36

DeltaCom maintains that these three interrogatories relate to back billing and billing audits; Issues 62 — “What is the limit on back billing for undercharges?” and 63 — “Is it appropriate to include language for audits of the parties’ billing for services under the interconnection agreement?” BellSouth argues that the interrogatories request information pertaining to performance measurements which were previously decided by the Authority and are not at issue in this arbitration.

Interrogatory Nos. 34, 35 and 36 request information pertaining to how billing adjustments are taken into account when calculating performance data. The information requested by DeltaCom is directly related to back billing and the Tier I enforcement mechanisms available to DeltaCom under the Tennessee Performance Plan. Therefore, BellSouth’s objection is overruled and BellSouth is hereby ordered to provide the information requested in DeltaCom Interrogatory Nos. 34, 35 and 36.

DeltaCom Interrogatory Nos. 38, 39 and 40

These three interrogatories request information on back billing provisions contained in BellSouth's contracts with vendors, interconnection agreements, affiliate agreements and agreements with incumbent providers. DeltaCom argues that these three interrogatories pertain to Issue 62 — "What is the limit on back billing for overcharges?" BellSouth argues that the request is "overly broad, irrelevant and unduly burdensome."

During the pre-hearing conference, DeltaCom proposed to limit the requests to BellSouth's agreements with other incumbent providers. BellSouth still objected to the amended language. The Pre-Arbitration Officer, however, finds that the requested information is relevant to outstanding Issue No. 66 and, with the amendment proffered by DeltaCom, the requested information should be readily available to BellSouth. Therefore, BellSouth is ordered to respond to the following interrogatory as amended by DeltaCom: In its contracts with other Tennessee incumbent local exchange carriers, does BellSouth have a time limit on back billing charges? If so, identify the agreement and the time limit.

DeltaCom Interrogatory Nos. 47 and 48

DeltaCom Interrogatory Nos. 47 and 48 pertain to Issue 26(c) — "Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE?" and Issue 26(d) — "What should be the market rate?" The two interrogatories request support for BellSouth's "market-based" switching rate.

BellSouth objects to these two requests arguing that the requests are "irrelevant and outside the scope of the proceeding." BellSouth states that the Authority lacks jurisdiction to set market rates in an arbitration proceeding conducted under Section 251 of the 1996 Telecom Act.

Issue 26 has been accepted by the panel as an issue in this arbitration. Clearly, in deciding this issue, the panel may have to determine whether it has the jurisdiction to set market-based switching rates in this proceeding. DeltaCom takes the position that the panel does have jurisdiction to set market-based switching rates and needs the information requested in Interrogatory Nos. 47 and 48 to support its position. Further, providing the requested information does not prejudice BellSouth's position. For these reasons, BellSouth's objection is overruled and BellSouth is hereby ordered to provide the information requested in DeltaCom Interrogatory Nos. 47 and 48.¹

DeltaCom Interrogatory Nos. 54, 56 and 57

DeltaCom Interrogatory Nos. 54, 56 and 57 were withdrawn by DeltaCom as part of an agreement with BellSouth to use similar information obtained in the Alabama arbitration proceeding between these two parties.

DeltaCom Interrogatory Nos. 65 and 66

DeltaCom contends that Interrogatory Nos. 65 and 66 relate to Issue 60(a) — "Should the deposit language be reciprocal?" and Issue 60(d) — "Must a party return a deposit after generating a good payment history?" BellSouth disagrees and argues that the interrogatories "are not relevant to any legitimate issue pending in this docket..."

Interrogatory Nos. 65 and 66, however, request information on the number of CLECs and retail customers who have paid deposits to BellSouth and the amount of such deposits — information only remotely related to Issue 60. The amount of the required deposits, however, does not appear to be contested. Therefore, BellSouth's objection is granted.

¹ It should be noted that Issue 26 appears to be an issue that may be addressed by the Authority in its *Triennial Review* proceedings. However, as of the date of this order, the FCC's *Triennial Review* order has not been released.

DeltaCom Interrogatory Nos. 67, 68 and 69

DeltaCom contends that Interrogatory Nos. 67, 68 and 69 relate to Issue 60(a) — “Should the deposit language be reciprocal?” and Issue 60(d) — “Must a party return a deposit after generating a good payment history?” BellSouth disagrees and argues that the interrogatories “are not relevant to any legitimate issue pending in this docket...”

These three interrogatories request information pertaining to BellSouth’s deposit policy for other customers — information relevant to Issue 60. Therefore, BellSouth’s objection is overruled and BellSouth is hereby ordered to provide the information requested in DeltaCom Interrogatory Nos. 67, 68 and 69. The responses however need only address BellSouth’s deposit policy as it relates to the reciprocity of deposits and return of deposits upon establishment of a good payment history.

DeltaCom Interrogatory No. 78

DeltaCom contends that Interrogatory No. 78 is needed to support its position on Issue 66 — “Should BellSouth provide testing of DeltaCom end-user data to the same extent that BellSouth does such testing on its own end-user data?” BellSouth argues that the interrogatory was propounded to address Issue 69 — “Should there be a process to allow a carrier to return a customer to its preferred provider in situations where the customer was inadvertently transferred to either DeltaCom or BellSouth?” — An issue which has been settled.

Interrogatory No. 78 requests information on the FID ETET service order process. Such information relates to end-user data referred to in Issue 66. Therefore, BellSouth’s objection is overruled and BellSouth is hereby ordered to provide the information requested in DeltaCom Interrogatory No. 78.

DeltaCom Request for Production of Documents No. 2

This request asks for “copies of contracts or agreements between BellSouth and its vendors and between BellSouth and other carriers that provides a limit on back billing of charges”. BellSouth objects to this request as “overly broad, irrelevant and unduly burdensome.”

Consistent with the agreement by the parties on DeltaCom Interrogatory Nos. 38, 39 and 40 to limit the response to agreements with Tennessee incumbent providers, this request should be similarly limited. The Pre-Arbitration Officer finds that the requested information is relevant to outstanding Issue No. 66 and, with the amendment proffered by DeltaCom, the requested information should be readily available to BellSouth. Therefore, BellSouth is ordered to provide portions of relevant documents related to back billing as it relates to BellSouth’s agreements with incumbent, Tennessee local exchange carriers.

DeltaCom Request for Production of Documents Nos. 3 and 4.

DeltaCom Request for Production of Documents Nos. 3 and 4 asks for cost studies and other analyses related to the development of BellSouth’s market rates. BellSouth objects to these requests as being “outside the scope of the proceeding.”

Consistent with the decision to overrule BellSouth’s objection to DeltaCom Interrogatory Nos. 47 and 48 pertaining to market based UNE rates, the Pre-Arbitration Officer also overrules BellSouth’s objection to this request. Therefore, BellSouth is ordered to provide the documents requested in DeltaCom’s Request for Production of Documents Nos. 3 and 4.

DeltaCom Request for Production of Documents Nos. 7 and 8.

DeltaCom Request for Production of Documents Nos. 7 and 8 requests copies of contacts and agreements providing BellSouth with “reverse collocation” as well as other correspondence related to such collocation arrangements. BellSouth objects to these requests as being “unclear

as to what DeltaCom means by reverse collocation agreement” and “overly broad and unduly burdensome.”

The term “reverse collocation” was defined by the parties in the joint matrix submitted on May 2, 2003. BellSouth also indicated during the pre-hearing that it “thinks” it provided this information in the Georgia arbitration proceeding involving these two parties. For these reasons, BellSouth is ordered to provide the documents requested in DeltaCom’s Request for Production of Documents Nos. 7 and 8.

DeltaCom’s Objections to BellSouth’s Interrogatories and Request for Production of Documents

Discussions at the pre-hearing conference determined that BellSouth Interrogatory Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 20 pertain to issues that have been settled and thus were withdrawn by BellSouth. Specific objections to remaining interrogatories are discussed below:

BellSouth Interrogatory No. 9

BellSouth Interrogatory No. 9 requests the number of DeltaCom access lines for each UNE zone in Tennessee. DeltaCom objects to this request on the basis that the information BellSouth seeks “is not relevant to any issue in the proceeding nor reasonably calculated to lead to the discovery of admissible evidence.”

During the Pre-hearing Conference, DeltaCom stated that it did not maintain its access line data by UNE zone but would be willing to provide its total number of lines served in Tennessee. BellSouth accepted this compromise.

BellSouth Interrogatory No. 10

BellSouth agreed during the Pre-Hearing Conference to withdraw Interrogatory No.10.

BellSouth Interrogatory No. 11

BellSouth Interrogatory No. 11 requests information on DeltaCom's local transport facilities. DeltaCom objects to this request on the basis that the interrogatory is "unduly burdensome, seeks information that is not relevant to any issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence."

During the pre-hearing conference, BellSouth argued that the request is directly related to outstanding Issue 11(b) — "Must all network elements be delivered to DeltaCom's collocation arrangement?" BellSouth also argued that such information is related to Issue 26(c) — "Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE?" BellSouth agreed, however, to accept data from 2003 only.

It appears that this interrogatory is directly related to Issues 11(b) and 26(c). Therefore, DeltaCom's objection is overruled and DeltaCom is hereby ordered to submit the information requested in BellSouth Interrogatory No. 11 as agreed to by the parties.

BellSouth Interrogatory No. 12

Despite objecting to this interrogatory, DeltaCom submitted the requested information to BellSouth.

BellSouth Interrogatory No. 20

BellSouth agreed during the Pre-Hearing Conference to withdraw Interrogatory No.20.

BellSouth Interrogatory No. 21

BellSouth Interrogatory No. 21 requests information on the value of DeltaCom's facilities in Tennessee. DeltaCom objects to this request on the basis that the interrogatory "seeks information that is not relevant to any issue in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence."

During the pre-hearing conference, BellSouth argued that the request is directly related to outstanding Issue 26(c) — “Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE?” BellSouth contends that such data could be used to calculate a market-based switching rate.

It appears that this interrogatory is directly related to Issue 26(c). Therefore, DeltaCom’s objection is overruled and DeltaCom is hereby ordered to submit the information requested in BellSouth Interrogatory No. 21 as agreed to by the parties.

BellSouth Interrogatory Nos. 22 thru 71

As pointed out by the parties, these are “contention” interrogatories that simply seek DeltaCom’s position on the issues; not specific data. DeltaCom objects to these interrogatories on the basis that “these identically stated subparts are overbroad and unduly burdensome.

Ample opportunity has been provided for the parties to present their positions. In fact, the parties have already outlined their positions in the joint matrix. The parties will again explain and justify their positions in direct and rebuttal testimony which will be subject to cross examination. For these reasons, it is the Pre-Hearing Officer’s opinion that Interrogatories 22 thru 71 are not necessary and, therefore, DeltaCom’s objection is upheld.

BellSouth Request for Production of Documents No. 1

BellSouth Request for Production of Documents No.1 states “Please provide all documents that are identified in, that support, or are otherwise related to your responses to BellSouth’s First Interrogatories.” DeltaCom objected to this request “to the same extent it objected to the corresponding interrogatories.”

Therefore, consistent with rulings on the objections to the interrogatories discussed above, DeltaCom shall produce the documents corresponding to the interrogatories to which DeltaCom has not objected or its objection has been overruled.

Revised procedural Schedule

During the pre-hearing Conference, the parties agreed to the following dates for responding to outstanding discovery and submitting testimony:

Remaining Discovery Responses — **July 28, 2003**

Direct Testimony — **August 4, 2003**

Rebuttal Testimony — **August 11, 2003**

Revised Joint Matrix — **August 15, 2003**

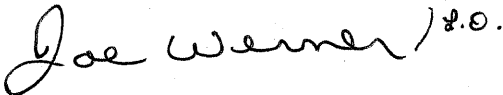
The hearing dates will remain **August 27, 28 and 29, 2003.**

IT IS THEREFORE ORDERED THAT:

1. BellSouth Telecommunications, Inc. shall file with the Authority and produce to ITC^DeltaCom Communications, Inc. the information requested in Interrogatory Nos. 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 47, 48 and 78 of *ITC^DeltaCom's Communications, Inc.'s First Set Of Interrogatories To BellSouth* and Request for Production of Documents Nos. 3, 4, 7 and 8 of *ITC^ DeltaCom's Communications, Inc.'s First Request For Production Of Documents* no later than 2 pm on July 28 , 2003;
2. BellSouth Telecommunications, Inc. shall file with the Authority and produce to ITC^DeltaCom Communications, Inc. the information requested in Interrogatory Nos. 3, 38, 39, 40, 54, 56, 57, 67, 68 and 69 of *ITC^ DeltaCom's Communications, Inc.'s First Set Of Interrogatories To BellSouth* and Request for Production of Documents No. 2 of

ITC^ DeltaCom's Communications, Inc.'s First Request For Production Of Documents as amended or otherwise agreed to by the parties no later than 2 pm on July 28, 2003;

3. The objections of BellSouth Telecommunications, Inc. to Interrogatory Nos. 29, 65 and 66 of *ITC^DeltaCom Communications, Inc.'s First Set Of Interrogatories to BellSouth* are hereby granted;
4. ITC^DeltaCom Communications, Inc. shall file with the Authority and produce to BellSouth Telecommunications, Inc. the information requested in Interrogatory Nos. 9, 11 and 21 of *BellSouth Telecommunications, Inc.'s First Set Of Interrogatories and Requests for Production of Documents To ITC^ DeltaCom's Communications, Inc.* no later than 2 pm on July 28, 2003;
5. The objections of ITC^DeltaCom Communications, Inc. to Interrogatory Nos. 22 thru 71 of *BellSouth Telecommunications, Inc.'s First Set Of Interrogatories and Requests for Production of Documents To ITC^ DeltaCom's Communications, Inc* are hereby granted;
6. The amended procedural schedule set forth in this report is hereby adopted:
7. Upon written motion, this Initial Order may be appealed to the Arbitrators within ten (10) days from its entry; and
8. If no party has appealed this Initial Order, after ten (10) days this Initial Order will become final.

 J.O.

Joe Werner, Pre-Arbitration Officer